FILED

JUL 26 1999

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NO. 99541

# In the

# Supreme Court of the United States

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Gabriele Omlin,
*Petitioner*

v.

Chris Ursetti,
*Respondent*

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT STATE OF OHIO

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## PETITION FOR WRIT OF CERTIORARI

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Gabriele Omlin
15 Hirzbodenweg
Basel, CH 4052
Switzerland
*Petitioner pro se*

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JOPP

## QUESTIONS PRESENTED

1.Has the Eleventh District Court of Appeals of the State of Ohio, to the prejudice of petitioner, misinterpreted the Hague Convention on Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters with regard to service of judgment by mail directly on petitioner residing in Switzerland, and to the timeliness of the notice of appeal?

2. Has a tenant a right to know under what staturory procedure a landlord is pursuing an action against her, when a single section of the state's statute gives a landlord three remedies and other statutes provide for each remedy a different specific procedure. and the landlord switches between them in a try and fail manner to state a claim under which relief can be granted? Can a court ignore a direct call for subject matter jurisdiction?

3. Is it undue process, when:

a) The court denies a tenant to attend, in person, a forcible entry and detainer hearing and does not record it?

b) The court allows respondent *ex parte* to drop the allegations contained in his complaint without giving petitioner an opportunity to object?

c) The magistrates files a pretrial report more than two hours before the unrecorded pretrial was ordered to be held, setting *ex parte* the matter for trial on unplead damages and attorneys' fee although there had never been a finding of facts or liability?

4. Has a landlord alleged damages smaller than tenant's security deposit to deduct from the deposit as required by contract and law, instead of using the legal system?

5. Does a plaintiff's new testimony in court that he has "no proof" for damages form a meritorious defense?

6. Can an attorney interfere in a contract by forcing the other party to extend rights to a person who is not party to the contract and by commencing an action without giving the contractual notice of default?

7. Is a motion for reconsideration ruled upon part of the record or a legal fiction?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

---

Gabriele Omlin,
*Petitioner*

v.

Chris Ursetti,
*Respondent*

---

On Petition for a Writ of Certiorari
to the Court of Appeals of Ohio, Eleventh Appellate District,
State of Ohio,

---

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below

## OPINIONS BELOW

The denial of the Supreme Court of the State of Ohio to hear the case appears at Appendix A and was announced on April 28, 1999.

The opinion of the Ohio Court of Appeals, Eleventh District, Lake County, Ohio, appears in Appendix B and is unpublished.

The judgment of the Willoughby Municipal Court, Lake County, Ohio, appears in Appendix C and is unpublished.

The opinion of the Ohio Court of Appeals, Eleventh District, Lake County, Ohio, appears in Appendix D and is unpublished.

The judgment of the Willoughby Municipal Court, Lake County, Ohio, appears in Appendix E and is unpublished.

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## JURISDICTION

The date on which the Supreme Court of the State of Ohio decided the case was April 28, 1999. A copy of that decision appears at Appendix A

A petition for rehearing was thereafter returned on May 10, 1999, and a copy of the letter appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C § 1257 and under Article III. § 2 of the Constitution of the United States.

## CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED

1. Article IV § 2 of the Unites States Constitution.

2. Fifth Amendment, Due Process Clause

3. Seventh Amendment, "the right of trial by a jury".

4. Fourteenth Amendment, Section. 1. "... nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

5. Hague Convention on The Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Articles 1, 3, 4, Article 10(a)(b)(c) "methods of service"; Article 16 "judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal".

6. Treaty of Friendship between the United States of America and Swiss Confederation, set in force on November 8, 1855, Article 1: "The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon footing of reciprocal equality in the two countries....";
they shall have free access to the Tribunals and shall be at liberty to prosecute and defend their rights before courts of Justice, in the same manner as native citizens, either by themselves, or by such advocates, attorneys or other agents as they may think proper to select."

7. Universal Declaration of Human Rights, December 10, 1948, Article 7, 8, 10, 12.

8. International Covenant and Civil and Political Rights, December 19, 1966, Article 14, 17, 25.

9. 8 U.S.C. 1101 18 U.S.C. § 1512, 28 U.S.C. § 1331, 28 U.S.C. § 1927, 28 U.S.C. § 1621, 28 U.S.C. 1983, 42 U.S.C. § 1981 (a)(b)(c), 42 U.S.C. § 1985(3), Fed. R. Civ. P. 4(1)(f)

## STATEMENT OF THE CASE

Petitioner, a resident and citizen of Switzerland, came to the United States on October 19, 1994 as temporary alien on a 180 days business visa (B2) pursuant to 8 U.S.C. §1101. The purpose of her visit was to facilitate for and on behalf of a European client his communication with an enterprise in the Cleveland area in the State of Ohio who had a contract to supply hardware and software for a process control system for an industrial plant in Ireland. It turned out that her presence was needed longer than expected, and the Immigration and Naturalization Service granted twice an extension of her visa, each for 180 days. The last extension expired on April 18, 1996. During all the time, Petitioner kept her permanent residence in Switzerland.

On November 22, 1994 Petitioner entered into a lease contract with Respondent for an unfurnished home from which he moved out in July 1994 and which he unsuccessfully tried to sell. Respondent wanted to put the home on the market again in spring. Respondent issued the contract and assured Petitioner that he was the owner of the home and confirmed when testifying the trial. Respondent gave Petitioner a phone number, but did not disclose his address. Through negotiations, the unlimited inspection provision in the contract, prepared by Respondent, was reduced to once a month on agreed time for the express purpose to check on the safety of the home and not to control Petitioner's live. With respect to "agent", Respondent declared that he would handle the lease himself without agent but that he might involve a real estate agent to sell the home. The lease started at December 1, 1994 and was to expire on May 31, 1995.

The contract was signed in this home with nobody else present. The monthly rent was 1,000 dollar. On November 22, 1994 Petitioner paid to Respondent in cash the December rent plus a security deposit in the amount of $ 1000.

On November 29, 1994, when she met Respondent at the premises, Respondent gave her two keys for two entrance doors, but no key for the back yard door, and one remote device for the automated garage door opener supplied with the home. He told Petitioner that he was keeping another set of keys for an emergency case. At this occasion he disclosed that the stove was not working and that the party room in the basement was leaking stemming from the removal of a swimming pool in the backyard. On this day, the parties had signed a statement on the condition of the home. It contained Respondent's obligation to repair the stove and the leaking basement.

On December 1, 1994 Petitioner moved. In the middle of December 1995 the alarm company discovered that the conduct at the backyard door had been removed and that the system needed to be upgraded with some motion detectors. With the Respondent's agreement the work was done on costs of Petitioner. Petitioner kept the same code Respondent had, and Respondent knew this. In December 1994, Respondent came to fix the stove, a couple of times to arrange for the repair of the leaking basement, and to collect the January rent. In the second half of January 1995 the work in the basement has been done which lasted about a week.

During the months of January 1995, Respondent urged Petitioner to either buy the home or, at least to enter in a longer term lease agreement and to pay the whole lease in advance, because he urgently needed a considerable amount of money to pay off bills. Respondent issued the contract and parties signed a new fourteen months lease agreement starting February 1, 1995 and ending March 31, 1996. On February 6, 1995, Petitioner paid to Respondent $ 14,000 lease in cash, and the security deposit had been carried over. The inspection provision had been changed in the same way as in the previous contract.

In May 1995, Respondent got a citation from the district health office for discharging wastewater into the road ditch, with which he complied in August 1995. In June/July 1995 Respondent had fixed the air condition which did not work. On August 22, 1995 Respondent got a citation from the electrical inspector, who rated the home as public safety risk, with which Respondent never complied and for which he never asked for access. On August 29, 1995 Respondent sent Petitioner a notice of default requesting a re-stacking of the firewood and ordering her to call him each months for inspections, under the thread of eviction. Having finally an address, Petitioner retained counsel to answer Respondent. With his letter of September 8, 1995, counsel transmitted Respondent's express complaints about the broken garage door opener, the unsafe electrical fixtures and attached a monthly inspection schedule with date and time. In addition, Petitioner hired a notary public and a second person to witness the inspections.

The record (the protocol on the inspection of September 30, 1995, a letter of counsel for Respondent and the transcript of Respondent's deposition) show that Respondent neither appeared for inspection in September nor in October of 1995, and that he made no attempt to comply with the outstanding citation of the electrical inspector.

The police report on the record shows that on the day the January 1996 was scheduled the new attorney on duty for Respondent called Petitioner's counsel telling him that Mr. and Mrs. Ursetti would come with the police to inspect the home.

The contract did not include any other person than Respondent and Petitioner had no information on his matrimonial status. A person named Rose Ursetti appeared for inspection in September of 1995 without showing any document that she was entitled to them. Instead of taking care of the broken garage door opener and the electrical failures she inspected Petitioner's closets proofing that she was unqualified to perform inspections. Petitioner had informed her that she is not party to the contract that she would not be allowed to further enter the premises.

When Petitioner arrived for the January inspection, the driveway was blocked by Rose Ursetti' s car preventing Petitioner from entering the premises.

The record further shows that, as counsel represented Respondent, Petitioner offered his counsel a date and time when he can inspect the home on behalf of his client, and that the counsel did not answer. Through her own counsel

Petitioner requested from Respondent to come and have the electrical problems fixed.

Instead of doing the repair as ordered by the electrical inspector, Respondent commenced the action.

## REASONS FOR GRANTING THE PETITION

### 1. Service under The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; Timeliness of the Appeal.

The United States is signatory to the Hague Convention since February 19, 1969; and Switzerland since January 1, 1995. As stated in its preamble, the purpose of this Convention is to create appropriate mans to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time, and to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure. To comply with their own laws and rules of procedure, the United States as well as Switzerland made, pursuant to article 21 of the Convention, some formal objections against the application of certain provisions of the Convention and deposited them, pursuant to Article 23 of the Convention, with the Ministry of Foreign Affairs of the Netherlands, which shall give notice to the signatory States of designations, oppositions and declarations other signatory States has made pursuant to article 21 of the Convention.

Switzerland's formal reservation deposited in accordance with article 23 of the Convention contained objections to the use in its territory of the methods of transmission provided for in articles 8 and 10, including objections to service by mail.

In *Ursetti v. Omlin* the Court of Appeals in the Eleventh District of the State of Ohio, compromised the Convention when it found that ""n appellant" case, the judgment entry transmitted abroad was meant to effectuate service on the appellant. In compliance with Civ. R. 58(B) and App.R. (4A), the judgment entry was filed and mailed to the appellant on June 27, 1996. This judgment entry mailed to appellant in Switzerland, activated the Hague Treaty in appellant's case."

On April 30, 1999 and on May 11, 1999, the Supreme Court of the State of Ohio endorsed *de facto* this judgment, by mailing its denial to hear the case directly on Petitioner in Switzerland.

This judgment is in conflict with other states courts which have consistently held that international mail service is not proper in the case of States party to the Convention which have entered an appropriate reservation under article 10 thereof. See Ristau, Vol. 1, Section 4-1-6, p.p. 121.3-121.9. See also, Epstein, International Litigation, A guide to Jurisdiction, Practice and Strategy, 2nd, 1994, Section 4.04(3), pp. 4-14-4-19. See also *Fast Continental Gems, Inc. v. Jakutial*, 153 Misc. 2d 883, 582 N.Y.S. 2d 594 (N.Y. Sup. Ct. 1992); *Aires Ventures Ltd. V. Axa Finance S.A.*, No. 86 Civ. 4442 (S.D.N.Y. March 30, 1990); *Hudson v. Capital Mgt. Int'l,* 1993 Fed. Sec. L. Rep. (CCH) 99,221 (N.D. Cal. 1982); See 20 U.S.T. 1361, 685 U.N.T.S. 163, T.I.A.S. No. 6638, 28 U.S.C.A. (Appendix following Rule 4 FRCvP), 16 L.L.M. 1339 (1977), Memo No. 386, (p. 14, footnote 11) 16 L.L.M. 1331 et seq (1977) and rule 4(f) (1) FRCvP, and USM-94.

Through diplomatic channel, in a letter to the judge in the lower court, the Government of Switzerland has stressed its continuing willingness to assist the United States courts to use the available channels of international judicial assistance under the Hague Convention and has, expressed in the usual diplomatic gangue, its pray to serve the judgment a new according to the Convention and to render it appealable.

When denying the timeliness of the appeal, the state court of appeals applied Art. 16 of the Convention and found that Petitioner is not entitled to the extension of the time of appeal under this provision, because she appeared with an answer and counterclaim. This provision expressed refers to cases "When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service under the provisions of the present Convention." Petitioner has received the summons while she was in the United States, and the subsequent order setting the matter for trial her forwarding address in the United States.

It is fundamental unfair and a denial of equal rights warranted by the Fifth and Fourteenth Amendment of the United States Constitution as well as by Article 7 of the U.N. Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights, to which the United States is signatory, to grant an extension of the time to appeal to somebody who has not appeared, but to deny the fundamental right to appeal to somebody who has appeared and make his responsible for late receive of judgment. This injustice hits likewise aliens (including tourists) leaving the United States to return home and Americans leaving for job

assignments abroad, who had received process while they were still in the United States. By this class of people it would be much appreciated if the state courts would apply the FRCvP 4(1)(f) District courts to extend the time for filing a notice of appeal. See *Pioneer Inv. Servs. Co. v. Brunswick Assocs.* 507 U.S. 380 and *Stutson v. United States* U.S. 116m St, 600 (1996)(per ciriam). U.S. Constitution, Fourteenth Amendment; Annotation page 13: "concept of jurisdiction promulgated in *Pennoyer* and modified over the years is a two- fold construction of due process: a concern for "fair play and substantial justice" involved in requiring defendants to litigate cases against them far from their "home" . . . ." 91.

This judgment has not been appealed because: (a) it is primarily the signatories' duty to solve disputes in the interpretation of the Convention through diplomatic channels. (b) It was questionable that the state court of appeals had original jurisdiction over this matter and that the state Supreme Court would review it. Ohio App. R. 14(B) prohibits the court of appeals to reduce or enlarge the time for filing a notice of appeal in civil cases. In *United States of America v. T.J. Thompson,* 1996 FED App. 0128P (6th Cir), the Court dismissed the appeal for lack of jurisdiction because it was unable to enlarge the time for filing a notice of appeal referring to Fed. R. App. P. 26(b); but indicated its willingness for review another related matter if defendant can obtain an extension of time in the lower court.

**2. Has a tenant a right to know under what statute and procedure a landlord is pursuing an action against her, when one section of a state's statute give a**

**landlord three remedies to pursue the alleged tenant's violation of the statute and other statutes provide for each remedy a different procedure and landlord's attorney stitches between them in a try and fail manner? Can a court ignore a direct call for subject matter jurisdiction?**

Section 5321.05(C) of the Ohio Revised Code gives landlords three possibilities to pursue violation of the statute: (a) normal civil action with normal procedure requiring actual damages incurred from the alleged violation and a specific dollar amount, with award of statutory of attorney's fee, with concurrent jurisdiction of courts of common pleas and municipal courts, depending on their monetary jurisdiction; (b) forcible entry and detainer with specific procedure pursuant to Section 1923 of the Ohio Revised Code and with concurrent jurisdiction of courts of common pleas and municipal courts depending, on their monetary jurisdiction, with statutory award of attorney's fee; (c) injunction including *ex parte*, as preventive remedy, with specific procedure pursuant to Section 2727 of the Ohio Revised Code and Ohio Civ.R. 65, requiring no pleading of damages but convincible evidence to justify this extra ordinary remedy with statutory posting of bond and no statutory award of attorney's' fee.

Respondent misrepresented and the reviewing court adopted it, that the complaint was a complaint pursuant to R.C. 5321.05(B)(C) what is impossible because he had no actual damages and his complaint did contain any request for monetary compensation, even not for one dollar.

Respondent opted for a temporary restraining order pursuant to Section 2727.02 of the Ohio Revised Code and Ohio Civ. R. 65(A), and filed in the municipal court a "Complaint by Landlord to Enjoin Alterations of Premises in Violation of Lease and Law, Restraining Order and Other Equitable Relief"

Simultaneously to the open action, Respondent tried to obtain the restraining order *ex parte*.

The clerk journalized the Complaint as case no. 96 CV1100205, (pursuant to the Sup R 36 the letter "H" stands for "other cases", and marked the complaint accordingly. As visible from the court journal, the court granted and held an *ex parte* hearing on February 15, 1996 at 10:30 a.m. No restraining order has been issued, either because the court made Respondent aware that it has no jurisdiction to hear a case under Ohio Revised Code 2727.02 and Ohio Civ. R. 65(A), or because plaintiff was not willing to pay the statutory bond.

Instead, on the same day, i.e. on February 15, 1996, Respondent issued a summons for eviction under Chapter 1923 of the Ohio Revised Code. Along with the summons for eviction, Petitioner received a copy of Respondent's proposal for an *ex parte* restraining order and a complaint identical with that earlier served upon her, with the only difference that the letter "H" has been changed into the letter "G" ("G" for eviction pursuant to Ohio Sup R 36).

The only remedy Respondent had in a municipal court, without incurred actual damages, was an eviction ac-

tion pursuant to Section 1923 of the Ohio Revised Code, which he ultimately pursued, but failed to give the three-day notice required by Section 1923.04 of the Ohio Revised Code without which a court lack subject matter jurisdiction.

Petitioner raised the lack of the jurisdictional prerequisite the first time in her letter of March 13, 1996, filed as a miscellaneous motion, served on Petitioner by the court along with her *prima facie* evidence. The court has marked this letter "consider pre-trial". Petitioner has raised the lack of subject matter jurisdiction again on May 24, 1996, by incorporating this March 13 letter in her affidavit, and referred to it in all subsequent pleadings including her appellate brief of January 2, 1998, and her memorandum in support of jurisdiction filed in the Ohio Supreme Court on January, 27, 1999.

This direct call for subject matter jurisdiction had been constantly ignored by the court of the first instance, as well as well as by the reviewing court.

In his appellate brief, Respondent argued that Petitioner's "reliance upon said correspondence along with the trial court's characterization of the action in a summons or in a civil docket form is completely unfounded" and shifts his responsibility for the summons to the court. He, however indirectly admits that he started the complaint in an other procedure by stating, that "The complaint originally (sic) brought by Plaintiff-Appellee was filed on February 13, 1996 pursuant to Ohio Revised Code Section 5321.05 which authorizes a separate and distinct remedy applicable when a tenant (the Defendant-Appellant) unnecessarily withholds

from the landlord (Plaintiff-Appellee) permission to inspect a premises."

**3. Is It Due Process, when:**

**a) The Court Denies A Tenant To Attend, In Person, A Forcible Entry And Detainer Hearing And Does Not Record It?**

From there the trial court followed the special procedure pursuant to R.C. 1923, i.e. no statutory 28 days to answer, no discovery period. The restraining order hearing already *ex parte* set for March 7, at 2:00 p.m. had been canceled and, instead a forcible entry and detainer hearing has been set for March 5, 1996 10:30 a.m. (a special weekday reserved for eviction hearings), that is within five days after the summons was due to be returned as required by the statute (time computed according to the rules).

Petitioner had been in court on March 5, 1996 at 10:30 a.m., along with her attorney and a notary public as witness and documentary evidence. Petitioner had not been asked into the courtroom to attend the hearing, but she and her witness had to stay outside. Instead she learned from her counsel that the magistrate has asked the parties to settle the inspection issue by agreement. Defendant agreed under the condition that plaintiff comes alone, that defendant's counsel provides for a police officer to be present, and that plaintiff makes arrangements for the necessary repairs (citation of the electrical inspector outstanding since August 1995, garage door opener broken since July 1995). This agreement has

been approved by the magistrate and has been entered in the court journal on March 7, 1996. In August 1996 Petitioner requested a transcript of this hearing and learned that it had not been recorded.

Plaintiff, in his appellate reply brief misrepresented and the reviewing court adopted it: "The matter came on for hearing on March 5, 1996 before the Honorable Magistrate Dale E. Lefferts. All parties (sic) were present and represented by counsel. As a result of said hearing Magistrate Lefferts issued a decision on March 7, 1996 establishing a temporary inspection schedule agreed to by Defendant-Appellant and Plaintiff-Appellee allowing Plaintiff-Appellee to inspect the premises as prayed for in Plaintiff-Appellee's Complaint. In short, the issue of inspection was resolved and Plaintiff-Appellee gained access to his home for the purpose of inspecting it. The matter was to be set for hearing as to those issues remaining."

> "the Complaint by Landlord to Enjoin Alterations of the Premises and for a Restraining Order and Other Equitable Relief and the Answer and Counterclaim hereto. The Magistrate finds that the parties have reached agreement relative to the issues presented in what amounts to the first cause of action in this Complaint. It is therefore the Decision of the Magistrate that:
>
> 1. The Plaintiff shall be permitted to inspect the premises in question on Monday March 11, 19996, at 9:00 a.m. The parties agree that counsel for the defendant will be present on this date and time together with a police officer from the City of Wil-

loughby Hills Police Department. Counsel for the defendant shall be responsible for contacting the police officer and having said officer present at the time of the inspection.

2. Counsel for the parties shall be responsible for arranging for a mutually agreeable time to show the premises in question to perspective purchasers or to allow for any needed repairs to the premises. In no event shall the agreed upon time for showing of the premises or repair of the premises exceed three (3) days from the date of first contact by Plaintiff's Counsel for Defendant's Counsel relative to a request for showing or repair.

3. The matter shall be set down for further hearing relative to the remaining issues as set forth herein by the Complaint and Counterclaim subsequent to a Reply to the Counterclaim being filed in a timely manner by Plaintiff. After such reply, the Court is to set this matter down for pretrial conference hearing before the Magistrate."

In her answer and counterclaim Petitioner had complaint about Respondent's intruding into the premises at other than arranged upon times, harassing and watching Petitioner in a manner which was offensive to Petitioner, Respondent's going into the home without notice and while none was at home and entering, on more than one occasion, onto the property without notice, of coming onto the property for the sole purpose of peering into the house through the window while Petitioner was home alone, and was forced to contact the local police department in an attempt to control

Petitioner's actions and that plaintiff has failed to adequately maintain the leased property.

In this decision the magistrate also states: "Present was the Plaintiff together with Attorney Daniel Taylor. Also present was the Defendant Jamie S. Callender (*sic*)".

In her letter to the court, filed on March 13, 1996, Petitioner also complained that she was not allowed to attend the hearing and informed the court that she has dismissed her counsel.

Following her request to inform Petitioner in writing what court order had been issued, the trial court confirmed the agreement as temporary order under Civ. R. 53(E)(4)(c) and set a pretrial for April 2, 1996 at 2:00 p.m. on no particular issue. Petitioner had to directly contact the court, because she was not allowed to attend the hearing and her counsel did not provided her with a copy of the magistrate's decision, lied to the police officer, gave Petitioner misleading information an the fact that Respondent and not Petitioner's counsel arranged for the police, that Responded came not alone as agreed upon but brought Rose Ursetti to the inspection, that Petitioners counsel sought direct and private contact with Respondent, that Respondent made no attempt to arrange for the repair of the broken garage door opener and the electrical installation, rate by the city inspector as public safety risk, and for which Respondent had a citation outstanding since August 22, 1995.

**b) Untrue Pretrial Report**

As raised in the first appeal which has been denied, on April 2, at 11:46 a.m. the magistrate has filed a pretrial report stating "defendant failed to appear" and recommending to set the matter for trial (The backup trial) on the issue of damages and attorney fees.

Plaintiff, in his appeal reply misrepresents and the reviewing court adopts it: "On April 2, 1996, a pretrial that had been scheduled as of March 9, 1996 was conducted. Defendant-Appellant did not appear. Counsel for Defendant-Appellant did not appear. Defendant-Appellant did not request a continuance."

On March 7, 1996, the court had issued a pretrial assignment ordering that "Counsel and parties must be present." Motions for continuance must be submitted at least 7 days prior to the scheduled hearing and must contain a brief in support setting forth the reason for a continuance, along with a proposed order for the court's review and approval. A continuance that has not been ruled on by the date of any hearing shall be considered to be denied."

On April 1, 1996, at 4:00 p.m., Respondent's attorney filed by facsimile a motion to continue the pretrial to enable him to attend the Cleveland Indians home opener, with proof that service has been made on defendant by mail on April 2, 1996. (Petitioner had never received it). This motion has never been ruled upon and was to be considered to be denied.

The invoices of the Cleveland Clinic and of the adjacent Omni Hotel and the flight ticket filed with her motion for reconsideration in response to the lower court's finding of October 10, 1997 that Petitioner did not appear for the pretrial, show that Petitioner had been in Cleveland from April 1, 1996 in medical treatment until April 9, 1996 the day when she left the United States.

Petitioner appeared for the pretrial in the lower court on April 2, 1996, at 2:00 p.m. Neither plaintiff nor his attorney was there. The staff at the counter advised defendant that no hearing be scheduled for this case.

**c) Setting the Matter for Trial on Damages and Attorneys' Fee without giving Petitioner an opportunity to respond.**

Respondent, in his appellate reply brief misrepresents, and the reviewing court sanctions it: "thereafter, on March 25, 1996, Defendant-Appellant filed a Motion to withdraw her Counterclaim... At that point, the only issue pending before the Court was the damages prayed for by Plaintiff-Appellee in the Complaint filed on March 13, 1996"... "At Plaintiff-Appellee's request, a trial was scheduled as to the issue of damages and attorney's fees only as prayed for in the original Complaint brought by Plaintiff-Appellee" ... "Testimony was presented as to damages to the premises and attorney's fees incurred relative to this matter a decision in the amount of One Thousand Dollars ... was awarded to Plaintiff-Appellee" ... "The original Complaint was brought pursuant to Ohio Revised Code Section 5321.05 which allows for the damages prayed for in Plain-

tiff-Appellee." . . . "Testimony was presented as to damages to the premises and attorney's fees incurred relative to this matter a decision in the amount of One Thousand Dollars . . . was awarded to Plaintiff-Appellee" . . ." The original Complaint was brought pursuant to Ohio Revised Code Section 5321.05 which allows for the damages prayed for in Plaintiff-Appellee" Complaint."". . ."A bill was provided at the original hearing as to damages relating to the cost of replacing the garage door opener."

Neither the "11" complaint nor the identical "G" complaint contained ever any damage claim. The first time when the alleged damage got a name and an amount was at the trial, when Respondent left the witness stand and the courtroom to pick up a fax which his attorney presented as bill in the amount of $320 for a garage door opener, whereas it was only a general estimate.

**d) Redressing at Trial an Issue Settled by Agreement.**

As both Respondent and Petitioner have settled the reciprocal request for a restraining order by agreement, from which Respondent consummated only this part he though favorable for him, the only remaining relief sought in the complaint was: "That Defendant be enjoined and temporarily restrained from maintaining and making further alterations to the premises so as to prohibit Plaintiff from exercising his rights under the lease and per Ohio Revised Code Section 5321.05", a relief the could not grant, nor could Petitioner be evicted, because the lease has expired on March 31, 1996

and she has moved out. To end the litigation, Petitioner had withdrawn her counterclaim. The only issues pending in court at the pretrial of April 2, 1996 were: Respondent's obligation to proof the allegations contained in the complaint, and Petitioner's direct call for subject matter jurisdiction of March 13, 1996. There had never been a finding of facts or a conclusion of law, which would have allowed to set a matter on attorney's fee.

A new magistrate had held the Trial of May 24, 1996. He was convinced "all the other issues had been resolved", answered by Respondent's attorney with: "Well, yes, they have. Other than the fact that the other referee knew the back drop to this and acknowledge that my client had been denied access in order to give access, and I don't know that there's ever been a finding of that but that was done". After a discussion of the record Respondent's attorney examined Respondent on the settled issue of inspection and had him read only the first paragraph of Petitioner's letter to Rose Ursetti, whereas the second paragraph states that Rose Ursetti was not a party to the contract. Thus mislead, the magistrate found that Petitioner had violated the contract and Respondent's statutory right to inspection. Although the statute requires actual damages resulting from the alleged violation to be entitled to attorney's fee, the magistrate, mislead by Respondent's attorney, awarded Respondent attorney's fee, on the very issue settled by agreement on March 5, 1996.

**4. Has a landlord alleged damages smaller then tenant's security deposit to deduct from the deposit and to return the remainder, as required by contract and law, instead of using the legal system?**

Respondent had from Petitioner a $1,000 Security deposit; by contract and Section 5321.16 of the Ohio Revised Code, Respondent was obliged to deduct any damages from the security deposit and to return the remainder to Petitioner. Neither the contract nor the state law allowed Respondent to use the legal system to claim alleged damages to the property as long as the security deposit covered the amount of the alleged damages. Setting the matter for trial on unplead unspecified damages without notice, has not only deprived Petitioner of the opportunity to object and of her right to have the alleged damages judged by a jury pursuant to the Seventh Amendment of U.S. Constitution, but was a breach of contract and an unlawful action. See *Mullane v. Central Hanover Bank & Trust Co.*, US 339 306 314 339 306, 314 (1050); *Armstrong v. Manzo,* US 380 545 550380 U.S. 545, 550 (1965). See also 485 U.S. 80, 85 *World-Wide Volkswagen Corp. v. Woodson*, US 444 286 291 444 U.S. 286, 291 (1980); *Mathews v. Eldridge*, US 424 319 333424 U.S. 319, 333 (1976); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, US 395 100 110 395 U.S. 100, 110 (1969); *Pennoyer v. Neff*, US 95 714 733 95 U.S. 714, 733 (1978).

## 5. Meritorious Defense

At the hearing on the motion to vacate the judgment, held by the trial magistrate, the magistrate was still convinced that there had been a liability established at the eviction hearing of March 5, 1996, that he confirmed this alleged established liability in separate paragraph in his decision of September 27, 1997.

At this motion hearing Respondent testified that he has "no proof" that Petitioner had damaged the garage door opener. He had been awarded $320 compensation based on his earlier testimony that an expert, which he had not presented, had said "the whole system needed to be replaced since the guy was not sure what the other company had done to it and since there was a different signal on there, he had to remove everything." Besides that it is a technical nonsense that the operator of a garage door opener has to be replaced because of a different signal, Respondent when admitting that he has no proof, established that Petitioner has a meritorious defense, in addition to the her *prima facie* evidence filed in court on March 13, 1996, including the local electrical inspector and the new owner of the home as witnesses

At the hearing on the motion to vacate the judgment and in his appellate brief, Respondent's attorney no longer claimed that Petitioner had caused damage to the garage door opener, but made the new claim that the contract and law obligated Petitioner to maintain the garage door opener, whereas he misrepresents that the second paragraph of the contractual maintenance provision restricts this obligation to damages caused by her and not to replace a 15 year old ga-

rage door opener which broke down because the wheel of the operator could not longer release/rewind the cable to open/close the door.

With its opinion the state court of appeals sanctions not only undue procedure and abuse of discretion in the lower court, but sanctions and adopts new misrepresentations in Respondent's appellate brief, and knowingly and intentionally even engages itself in misrepresentation of the procedure and of the documentary evidence on record. In her Memorandum to support the jurisdiction of the Supreme Court Petitioner has, as far as the page restriction allowed it, addressed this misrepresentation by the lower as well as by the intermediate court.

**6. Can An Attorney Interfere In A Contract By Forcing The Other Party To Extend Rights To A Person Who Is Not Party To The Contract And By Commencing An Action Without Giving The Contractual Notice Of Default.**

Respondent's attorney has interfered in the contract by forcing Petitioner to extend rights to Rose Ursetti, alleged wife of Respondent, who was not party to the lease and had no purpose to access the home, defined by in Section 5321.04 of the Ohio Revised Code. The lower court has awarded Respondent attorney's fee because Respondent's attorney made Respondent at the trial to read the letter Petitioner had written to Rose Ursetti. Respondent's attorney has made the magistrate believe that Rose Ursetti had a contractual inspection right.

**7. Is a Motion for Reconsideration, Ruled Upon by the Court, part of the record or a legal fiction.**

In its opinion of December 14, 1998, the state court of appeals finds that a Motion for Reconsideration is legal fiction. In this Motion filed on November 7, 1996, Petitioner compared the contradicting testimonies Respondent has given at the trial, at a deposition and at the hearing to vacate the judgment. This summary of Respondent's testimony demonstrates that Respondent contradicted not only his testimonies but also his attorney's representations and all allegations contained in the complaint.

**8. Legal Representation**

In its opinion the state court of appeals sanctions not only undue procedure and abuse of discretion in the lower Court, but sanctions and adopts new misrepresentations in Respondent's appellate brief in her memorandum to support the jurisdiction of the Supreme Court Respondent has, as far as the page restriction allowed it, addressed this issue.

Petitioner has not left the matter unattended, but was prohibited by the federal immigration laws to reenter the United States before 185 days after she returned home. If she had ignored this law, she would have committed a federal crime.

In *Pioneer,* 507 U.S. at 388, this Honorable Court defined "excusable neglect" as some jurisdictional act which was left "undone or unattended esp(specially) through carelessness." Id. (citation omitted). With Pioneer as its basis, this Honorable Court expanded in *Stutson* its excusable neglect" analysis beyond the confines of bankruptcy rules to Fed. R. App. P.4. In *Stutson*, the Court noted that the "liberal understanding of "excusable neglect" announced in Pioneer is especially applicable in criminal appeals under Fed. *Stutson,* 116 S.Ct. at 602. It emphasized that when a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, the legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated.

## CONCLUSION

The original judgment in the Ohio Municipal Court is in conflict with the state statute and the state case law. It is based on false testimony by Respondent and misrepresentation by his attorney, and on undue process. Both the lower and the intermediate court were partial and misrepresented the factual evidence on record and footed their judgments on defendant's nationality and, the lower court even on an assumed profession[1]..

Respectfully submitted,

Gabriele Omlin,
*Petitioner, pro s*
15, Hirzbodenweg
Basel, CH 4052
Switzerland
011-4161-321-8975

[1] Defendant is not an attorney in Switzerland, but has a formal education in law and business from another European Country and never practised law.

**APPENDIX A**

THE SUPREME COURT OF OHIO

"ENTERED
April 28 1999"

1999 TERM

| | | |
|---|---|---|
| Chris Ursetti, | : | |
| Appellee, | : | Case No. 99-199 |
| v. | : | E N T R Y |
| Gabrielle Omlin, | : | |
| Appellant. | : | |

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS: Docket Fee, $ 40.00, paid by Ruthie C. Stroll.
(Lake County Court of Appeal; No. 97L287)

s/ Thomas J. Moyer
Chief Justice

0065r042899

**APPENDIX B**

COURT OF APPEALS
ELEVENTH DISTRICT, LAKE COUNTY, OHIO

„Entered Dec 14, 1997"

| | |
|---|---|
| | JUDGES |
| Chris Ursetti | Hon. Judith A. Christley , P.J.) |
| Plaintiff-Applee | Hon. William M. O'Neill, J. |
| | Hon. Mary Cacioppo, J. Ret., |
| vs | (Ninth Appellate District |
| | sitting by assignment) |
| Gabrielle Omlin | |
| Defendant-Appellant | ACCELERATED |
| | CASE NO. 97-L-287 |
| | OPINION |
| Character of | Civil Appeal from |
| Proceedings | Willoughby Muncipal Court |

CHRISTLEY, P.J.

This is an accelerated appeal taken from a final judgment of the Willoughby Municipal Court. Appelant, Gabrielle Omlin, appeals from the trial court's denial of her motion for relief from judgment.

Appellant is a citizen of Switzerland. In 1994, appellant entered the United States on a visa and moved to Ohio in order to monitor a work-related project. Upon her arrival, appellant rented a house in Willoughby Hills, Ohio from appellee, Chris Ursetti. On November 22, 1994, the parties executed a six-month written lease agreement by which appellant leased the premises from December 1, 1994 until

June 1, 1995. Pursuant to this document, appellant agreed to pay $1,000 securitydeposit an $1,000 per month in rent to appellee.

Thereafter, the partiesentered into new lease on February1, 1995. By the terms of this contract, appellant agreed to rent the house for the fourteen-month period from February 1, 1995 through March 31, 1996 at a monthly rate of $1,000. Appellant paid the entire$14,000 in rent on the day the lease was signed. Her previous security deposit carriedover to secure the performance of this second lease. The new lease contained a covenant securing appelle's right to inspect the premises. It stated: "Lessor and his agents shall have the at all reasonable times during the term of this lease and any renewal thereof to enter the demised premises for the purpose of inspecting the premises and all building[s] and improvements thereon".

By virtue of a handwritten notation on the lease itself, appellee promised to inspect the property only once per month, subject to appellant's consent to the time and date of the inspection.

Appellee's right of inspection, however, soon became a major source of acrimony between the parties. Appellant felt that appellee was abusing his limited privilege to examine the property, while appellee believed that appellant was undubly interfering with his ability to enter the property even once a month. This animosity between the parties continued to fester throughout the lease period.

Finally, on February 13, 1996, appellee filed a complaint against appellant in the trial court. The complaint was brought pursuant to R.C. 5321.05(C)(1) and alleged that appellant was unreasonably withholding consent for appellee to enter the house for purposes of inspection in violation of

R.C. 5321.05(B).[1] Appellee sought injunctive relief enjoining appellant from making any further alterations to the property and oprdering her to allow appellee to inspect the premises. He also requested reasonable attorney fees incurred as a result of the ligitation. Appellant filed an answer to the complaint and a counterclaim against appellee on February 29, 1996.

On March 5, 1996, the matter came on for a hearing before a magistrate. Both parties were present and represented by a legal counsel. After the hearing, the magistrate issued a written decision in which he founf that the parties had reached an agreement as to an exact date and time for appellee to inspect the property. The magistrate ordered the inspection to go forward as agreed upon by the parties. In a judgement entry dated March 19, 1996, the trial court adopted the magistrate's decision as ist own and scheduled a pretrial conference for April 2, 1996, to discuss any pending claims.

On March 25, 1996, counsel for appellent filed two motions: (1) a motion to withdraw appellants' counterclaim

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[1] R.C. 5321.05 reads in part:

"(B) The tenant shall not unreasonably withhold consent for the landlord to enterinto the dwelling unit in order to inspect the premises, make ordinary, necessary, or agreedrepairs, decorations, alterations, or improvements, deliver parcels that are too large for the tenant's mail facilities, supply necessary or agreed services, or exhibitthe dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen, or contractors."

"(C)(1) If the tenant violates any provision of this section, other than division (A)(9) of this section, the landlord may recoverany actual damages that result from the violation together with reasonable attorney's fees. This remedy is in addition to any right of the landlord to terminate the rental agreement, to maintain an action for the possession of the premises, or to obtain injunctive relief to compel access under division (B) of this section."

against appellee; and (2) a motion to withdraw as appellants' counsel at her request. The trial court granted both motions the following day. Thus, as of March 26, 1996, appellant was proceeding *pro se* in this matter.

As stated previously, the lease under which appellant occupied appellee's house as a tenant was et to expire on March 31, 1996. The termination of the lease was timed to coincide with the expiration with the appellants' visa on March 30, 1996 at which time she was to return to her native Switzerland.

The record contains a document bearing a time-stamped date of April 1, 1996, that was filed *pro se* by appellant. As part of this filing, appellant included a letter addressed to the trial court that was dated March 30, 1996. In this letter, appellant expressly acknowledged receiving a copy of the trial court's March 19, 1996 judgment entry in which the court adopted the magistrate's decision and scheduled a pretrial conference for April 2, 1996. Appellant stated in the letter: "[T]he lease is up [at the] end of March 1996 and my visit here is terminated. I am not available for a Pretrial on April 2, 1996 or any further trialon this eviction complaint." A pretrial conference was conducted on April 2, 1996 by a magistrate. The magistrate's report recommended that the trial court set the matter for trial on the question of whether appellee was entitled to recover any actual damages together with reasonable attorney fees based on appellant's allegedinfringement of the right to enter the premises und R.C. 5321.05(B). upon review of the magistrate's report, the trial court issued a judgment entry on April 3, 1996 ordering that the case be scheduled for trial on may 15, 1996.

Thereafter, appellee's counsel moved for a continuance of the trial due to a previously scheduled trip. In a judgment

entry dated April 16, 1996, the trial court granted the continuance and rescheduled the trial for May 24, 1996.
The record the contains a document filed in the trial court by appellant on May 23, 1996 via a facsimile transmission from Switzerland. This document contains an affidavit of appellant in which she avers that she received copies of the trial court's judgment entries of April 3 and April 16, 1996. As previously indicated, the former entry scheduled the original trial date, while the latter entry postponed it until May 24, 1996.

In this affidavit, appellant also stated as follows: "I am unable to appear in Court on May 24, 1996 at 2:00 p.m. for reasons beyond my control, but due to the regulations of the Immigration and Naturalization Service of the US Department of Justice." Appellant, however, did not request a continuance of the trial. Instead, the affidavit contained averments denying the substance of the allegations contained in appellee's complaint. Appellant apparently wanted te trial court to consider these averments in place of her live testimony when the matter came on for trial.

The case did proceed to trial before a magistrate as scheduled on may 24, 1996. Appellee was present and represented by counsel. Appellant did not appear for the trial, and there was no counsel of regard to appear on her behalf since she was proceeding *pro se*.

Appellee was the only witness to testify at the proceeding. He detailed how appellant refused to allow him access to his rental property from September 1995 until appellant vacated the premises at the end of March 1996.Appellee also testified that the house was equipped with an electric garage door opener that functioned properly at the start of the lease period. After appellant moved out,

appellee inspected the property and discovered that the garage door opener was damaged and needed to be replaced. By way of exhibits, appellee submitted a written estimate for $320 from a garage door repair company and an itemized bill from his attorney showing $925 of legal fees incurred since the commencement of the ligitation.

On May 31, 1996, the magistrate filed a written decision. Among the findings of facts and conclusions of law were the following: (1) appellant violated R.C. 5321.05(B) by failing to allow appellee to inspect the premises after being given reasonable notice of the time and manner of inspection; (2) appellant damaged the garage door opener in the amount of $320; and (3) appellee was entitled to recover reasonable attornes fees of $680, even though the actual fees totaled $925. The magistrate, therefore, recommended that judgment be rendered in favor of appellee in the amount of $1,000 and that appellee should keep appellant's $1,000 security deposit to satisfy the judgment. On June 27, 1996, the trial court adopted the magistrate's decision and entered judgment against appellant in the amount of $1,000 plus ten per cent interest.

A copy of the June 27, 1996 judgment entry was mailed to appellant at her address in Switzerland. Obviously, there was no counsel of record to be notified since appellant had previously dismissed her attorney. Appellant allegedly did not receive the entry until July 26, 1996, thereby precluding her from filling a notice of appeal with this court within the thirty-day time period allowed by App.R. 4(A).

Appellant, nontheless, decided to retain legal representation once again and through this new counsel filed an appeal with this court on August 23, 1996. Attached to the notice of appeal was an accompanying memorandum in

which appellant argued that Article 16 of the Hagues Treaty applied to extend her time for filling a notice of appeal. We, however, found Article 16 inapposite as applied to appellant and accordingly dismissed her appeal for lack of jurisdiction. See *Ursetti v. Omlin* (Nov. 29, 1996), Lake App. No. 96-L-147, unreported.

After her appeal was dismissed by this court, appellant filed a separate action against appellee in the Cuyahoga Court of Common Pleas. By doing so, appellant was afforded a new chance to engage in discovery, and she took advantage of this opportunity by deposing appellee and his wife.

Appellant then returned once again to the Willoughby Municipial Court. On June 26, 1997, she filed a motion for relief from judgment pursuant to Civ.R. 60(B). In this motion, she asked the trial court to vacate its June 26, 1996 judgment entered against her based primarily on information derived from appellee's deposition testimony given in the lawsuit pending in the Cuyahoga County Court of Common Pleas.

The trial court assigned the matter to a magistrate for a hearingon appellant's Civ.R. 60(B) motion. The magistrate conducted the hearing on August 15, 1997. Appellant returned from Switzerland to attend the proceeding. She and appellee were present and representedby counsel, and both of them testified.

On September 2, 1997, the magistrate issued a written decision in which he recommended that appellant's Civ.R. 60(B) motion be denied. Appellant subsequently filed written objections to the magistrate's decision. On October 10, 1997, the trial court adopted the recommendation of the magistrate and overruled the motion. In response, appellant

filed a thirty-two page for reconsideration with attached exhibits. The trial court found that it had previously considered appellants' arguments in support of vacating judgment and, therefore, overruled her motion for reconsideration on November 10, 1997.

In order to preserve her right of appeal, appellant filed an appeal with this court on November 1997, 1997. She now asserts the following assignments of error, which we will consider in reverse order:

"[1.] The trial court erred to the prejudiceof the defendant-appellant in denying her Motion for Relief from Judgment Pursuant to Rule 60(B) and her Motion for Reconsideration."

"[2.] The trial court erred in entering judgment because it lacked subject matter jurisdiction."

In her second assignment of error, appellant posits that the trail courterred in entering the June 26, 1997 judgment because it lacked subject matter jurisdiction over the case. This argument is predicted entirely on appellants' contention that appellee instituted an eviction proceeding against her. Under Ohio law, a landlord must give a tenant written notice to vacate the premises at least three days prior to instituting a forcible entry and detainer (*i.e.*, eviction) action.R.C. 1923.04.[2] See, also, White, Ohio Landlord tenant law

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2 R.C. 1923.04 provides in pertinent part:

"(A) Except as provided in division (B) of this section, a party desiring to commence an action under this chapter shall notify the adverse party to leavethe premises, for the possession of which the action is about to be brought, three or more days before beginning the action, by certified mail, return receit requested, or by handing a written copy of the notice to the

(1996), Section 13.4, at 280. If the landlord does not provide a statutorily proper three-day notice to the tenant, then the trial court lacks subject matter jurisdiction over the action. *Knoll Group Mgt. Co. v. Wolfe* (June 28, 1994), Adams App. Nos. 93 CA 553 and 93 CA 554, unreported, at 9-10, 1994 Ohio App. LEXIS 3016.

In her brief before this court, appellant takes the position that appellee filed a forcible entry and detainer action against her without giving at least three days notice to leave the premises before initiating the judicial proceeding. If so, then the trial court lacked jurisdiction to adjudicate appellee's complaint due to his lack of compliance with R.C. 1923.04. Appellant's position is entirely unfounded. A review of the complaint. filed by appellee on February 23, 1996 reveals that it was an action to enjoin alteration of the premises and to enforce the right of inspection under R.C. 5321.05. It was not a forcible entry and detainer action as provided for by R.C. 1923.04.

The complaint actually invoked R.C. 5321.05 as its statutory basis. It neither cited R.C. 1923.04 nor employed any language to suggest that appellee wished to evict appellant from the house prior to the natural termination of the lease on march 31, 1996. Consequently, the three-day notice provision of R.C. 1923.04 was inapplicable, and the trial court did not lack subject matter jurisdiction over the case. Appellants' second assignment ist not well-taken.

In her first assignment of error, appellant suggests that the trial court erred by denying her Civ.R. 60(B) motion for relief from judgment and her subsequent motion for reconsideration. We will consider each motion in turn.

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defendantin person, or by leaving it at his usual place of abode or at the premises from which the defendant is sought to be evicted."

Civ.R. 60(B) enumerates several grounds upon which relief from final judgments and orders may be granted. It provides in part:

"On motion and upon such terms as are just, the court may relief a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken."

In order to prevail on a motion brought under Civ.R. 60(B), the moving party must demonstrate the following: (1) the movant has a meritorious defense or claim to present if relief is granted; (2) the movant is entitled to relief under one of the enumerated grounds stated in the rule; and (3) the motion is made within a reasonable time, and, where the grounds for relief are Civ.R. 60(B)(1), (2), or (3), not more than one year after the judgement, order or proceeding was entered or taken: GTE Automatic Electric v. ARC Industries (1976), 47 Ohio St.2d 146, paragraph two of the syllabus; Taaffe v. Taaffe (Dec. 26, 1997), Trumbull App.

No.96-T-5616, unreported, at 6-7,1997 Ohio App. LEXIS 5865. The moving party must satisfy all three prongs of the test in order to prevail. Arga Plastic Products Co. v. Ceveland (1984), 15 Ohio St.3d 389, 391; Svoboda v. Brunswick (1983), 6 Ohio St.3d 348, 351.

The decision whether to grant a Civ R. 60(B) motion rests within the sound discretion of the trial court. Griffrey v. Rayan (1987), 33 Ohio St.3d 75, 77. The trial court's ruling will not be disturbed on appeal absent a clear showing of abuse of discretion. Id.; Moore v. Emmanuel Family Training Ctr. (1985), 18 Ohio St.3d 64,66; Taaffe, 1997 Ohio App. Lexis 5865, at 7.

The denial of appellant?s Civ R. 60(B) motion in the trial court was predicated on the first and third prongs of the GTE test. In affirming the trial court`s decision, we elect to rely on the second prong of GTE alalysis, to wit: appelllant failed to prove that she was entitled to relief under one of the grounds stated in Civ.R. 60(B).

Appellant's Civ.R. 60(B) motion requested relief on the grounds of excusableneglect under (B)(1), newly discovered evidence under (B)(2), and fraud, misrepresentation, or other misconduct of an adverse party under (B)(3). With regard to the first ground, appellant's neglect in defending herself against the action was not excusable. The record reflects that appellant initially was represented by counsel, but that her attorney filed a motion to withdraw at appellant's request on March 25, 1996. Upon the granting of the motion appellant was proceeding pro se by her own choice. Appellant knew that not only was the pretrial hearing scheduled for early April, but that her visa expired at the end of March. Despite her imminent departure from the country and the pending

pretrial hearing, appellant dismissed her counsel and elected to represent herself.

Appellant nitified the trial court that not only would she miss the pretrial, but that she would also be unavailable for "ani further trial" stemming from appellee's compaint. Appellant then missed the pretrial because she was in Switzerland. The trial court set the trial for May 24, 1996 and sent notice of the date to appellant in Switzerland. It id uncontroverted that appellant received this notice. Rather than requesting a continuance until she was able to retain counsel or able to re-enter the United States, appellant faxes an affidavit to the trial court in which she indicated that she would not be attending this or any other trial.

Under these circumstances, we are not inclined to view appellant's actons as excusable neglect. Appellant can not now be heard to complain that she was not at the May 24, 19996 trial when she declared that she would be unavailable for "any further tria" and then failed to move for a continuance after leaving the country without any retained counsel to represent her interests in the pending litigation.
Appellant next claims that she was entitled to have the judgment against her vacated on the grounds of newly discovered evidence under (B9(2) and fraud, misrepresentation, or other mosconduct of an adverse party under (B)(3). These reasons are interrelated in that both are predicated on appellee's deposition testimony given in the lawsuit filed in the Cuyahoga County Court of Common Pleas. Essentially, appellant contends that this testimony contradicted the allegations contained in appelle's complaint and his testimony given at May 24, 1996 trial.

Initially, we would note tat appellant could have moved to depose appellee in the origina action filed in the trial

court. Alternatively, appellant could have retained counsel to appear on her behalf at the May 24, 1996 trial for the purpose of crossexamining appellee regarding the right to inspect the premises and the purpoted damage to the garage door opener. Instead, appellant waited until a judgment had been rendered against her in the trial court, only after which did she file a separate action against appellee in a different court in order to despose him.

Opon review, we do not believe that the tria court abused its discretion in declining to vacate its previous judgment on the grounds of newly discovered evidence or fraud, misrepresentation, or other misconduct of an adverse party. Appellant did not prove that she was entitled to relief based on her newly discovered evidence, and she certainly did not establish that appellee had engaged in any improper conduct.

Finally, apellant also suggests in her brief that she is entitled to relief from judgment because appellee's counsel perpetrated a fraud on the court during the May 24, 1996 proceeding. Specifically, appellant claims that counsel for appellee misld the magistrate into believing that appellent's liability for damages and attorney fees had already been established at the April 2, 1996 pretrialhearing. From appellant's perspective, counsel induced the magistrate into believing that the need for a trial had been obviated, and the sole purpose of the May 24, 1996 hearing was to award appellee damages and attorney fees.

At the outset, it would be helpful to distinguish fraud on the court form fraud by an adverse party for purposes of Civ.R. 60(B). If the alleged fraud occurred between the parties , Civ.R. 60(B)(3) is the only ground upon which the aggrieved pary can seek relief from a prior judfment.

*Coulson v. Coulson* (1983), 5 Ohio St.3d 12, 15. If, however, a fraud is perpetrated on the trialcourt, then Civ.R. 60(B)(5) presents the proper basis for requesting relife form an otherwise final judgment or order. *Id.;Taaffe*, 1997 Ohio App. LEXIS 5865, at 8-9.

The Supreme Court of Ohio has noted that any fraud connected wiht the presentation of a case is a fraud on the court in the broades sense. Coulson, 5 Ohio St.3d at 15. The court, however, went on to hold that for purposes of Civ.R. 60(B)(5), a fraud on the court generally requires that the fraud be perpetrated by an officer of the court (e.g., an attorney) which compromises the ability of the judiciary to adjudge the case in an impartial manner. Id

In the instant matter, a review of the record reveals where the confusion arose regarding the nature of the May 24, 1996 proceeding. After the pretrialwas conducted on April 2, 1996, the magistrate issued a report recommending that the matter be set for trialon the issues of damages and attorney fees. There was no objection to this recommendation. Thereafter, the trialcourt ordered a trial on those issues.

At the May 24, 1996 trial, a different magistrate was presiding. It was not the same individual who had conducted the April 2, 1996 pretrial hearing. The trial transcript does indicate that the magistrat made inquiry of appellee's counsel as to the nature of the proceeding that was scheduled to take place:

"[MAGISTRATE]: [W]e're only here on damages and attorney's fees, is that what I understand?

"[COUNSEL]: That's correct.

"[MAGISTRATE]: I thought all the other issues had been resolved.

"[COUNSEL]: *** [T]he other referee knew the back drop to this and acknowledged that my client had been denied access *** and I don't know that there's ever been a finding of that[,] but that was done."

This excerpt demonstrates that counsel for appellee did not mislead the magistrate into believing that appellant's liability for damages and attorney fees had already been proven at the April 2, 1996 pretrial hearing. Rather counsel stated that while the other magistrate was familiar with the evidence, he was not sure whether the other magistrate ever made a legal finding of liability. In light of this, it is obvious that counsel for appellee did not perpetrate a fraud on the court.

Despite whatever confusion existed at the outset of the May 24, 1996 proceeding, the magistrate went on to conduct an *ex parte* trial on all issues wherein appellee, as the party seeking relief, proceeded in appellant's absence. A judgment based upon an *ex parte* trial is not a default judgment under Civ.r. 55, but rather is a judgment after trial pursuant to Civ.R. 58. *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118, 122.

Appellee testified in support of the allegations contained in his complaint. Evidence was presented regarding appellant's interference with the right of inspection and the damage done to the garge door opener. Thereafter, the magistrate issued a decision containing findings of fact and conclusions of law. Among the legal conclusions drawn by the magistrate were that appellant "failed to allow Plaintiff to

inspect the premises" and that appellant "caused damage to Plaintiff's garage door opener[.]" The trial court then adopted the magistrate's decision and rendered judgment for appellee.

Appellant was not entitled to relief from judgment under Civ.R. 60(B)(5) due to a fraud on the court. Moreover, she did not establish that the judgment against her shoul be vacated because of excusable neglect under (B)(1), newly discovered evidence under (B)(2) , or fraud, misrepresention, or other misconduct of an adverse party under (B)(3).

Finally, appellant's first assignment also proposes that the trial court erred by overruling her motion for consideration. Two observations are in order regarding this proposition. First, a motion for reconsideration in the trial court is a nullity. *Pitts c. Dept. of Transp.* (1981), 67 Ohio St.2d 378,380. See, also, *Chester Twp. v. Faternal Order of Police, Ohio Labor Council, Inc.* (1995), 102 Ohio App.3d 404, 408; *State ex rel. Pendell v. Adams Cty. Bd. of Elections* (1988), 40 Ohio St.3d 58, 60. Second this case only prsents an appeal from the trial court's October 10, 1997 judgment denying the Civ.R. 60(B) motion. Appellant never filed an appeal from the trial court's November 10, 1997 judgment overruling her motion for reconsideration.

Thus, the denial of appellant's motion for reconsideration is not even properly before this court. Even if it was, the trial court's order disposing of such motion was itself a nullity.

The trial court did not abuse its discretion in denying appellant's Civ.R. 60(B) motion for relief from judgment, and appellant's corresponding motion for reconsideration was a legal fiction that is not recognized under the Ohio Rules of Civil Procedure. Finally, without further analysis, we agree with the trial court that appellant's Civ.R. 60(B)

motion was not filed within a reasonable time, even though if was within one year from the date of the judgment entry. Hence, appellant's first assignment is without merit

Based on the foregoing analysis, appellant's two assignments of error are not welltaken. Accordingly, the judgment of the trial court is affirmed.

s/ Judith A. Christley
Presiding Judge

O'Neill, J.,
Cacioppo, J., Ret., Ninth Appellate
District, sitting by assignment,
concur.

**APPENDIX C**

IN THE ELEVENTH DISTRICT COURT OF APPEALS,
LAKE COUNTY, OHIO
„Entered Dec 2 1996"

| | |
|---|---|
| | JUDGES |
| Chris Ursetti<br>Plaintiff-Applee | on.Donald R. Ford, P.J.,<br>on. Judit A. Christley, J.,<br>Hon. Robert A. Nader, J. |
| - vs - | |
| Gabrielle Omlin<br>Defendant-Appellant | ACCELERATED<br>CASE NO. 96-L-147<br>MEMORANDUM OPINION |
| Character of<br>Proceedings | Civil Appeal from<br>Willoughby Muncipal Court<br>Case No. 96 CVG 00205 |

FORD, P.J.

On August 23, 1996, appellant filed along with her Notice of Appeal a document captioned as a "Memorandum in Support of Timeliness of Notice of Appeal" for this court to determine whether the time for filing a Notice of Appeal, pursuant to App.R. 4(A), can be extended by applying Article 16 of the Hague Treaty.

Appellant, Gabrielle Omlin, was allegedly a resident of Switzerland when judgment was entered against her, on June 27, 1996, in Willoughby Municipal Court. The judgement entry was sent to her address in Switzerland via the United States mail. Allegedly, Ms. Omlin did not receive the judgement entry until July 26, 1996, after her time for filing a Notice of Appeal had expired. Subsequently, on August

23, 1996, Ms. Omlin filed her Notice of Appeal, some twenty-five days after the thirty-day time guilding provided by App.R. 4(A).

On October 2, 1996, appellee filed a motion to dissmiss based upon the untimely filing of appellant's Notice of Appeal. Appellant's opposition to the motion was filed on October 17, 1996.

This appeal presents two issues for consideration: (1): does the Hague Traty apply to this case; and (2) if so, did the appellant comply with the requirements of Article 16 of that treaty.

Article 1 of the Hague Treaty defines the scope of the Convention. It provides: "[T]he present Convention shall apply in all cases, in civil or commercial matters where there is occasion *to transmit a judicial or extrajudicial document for service abroad.*" 20 U.S.T. at 362 (Amphasis added.)
In the case at bar, service had been perfected on appellant; however, the judgment entry, allegedly, was not received in time to file a timely Notice of Appeal. Therefore, at issue is whether the purportedly late receipt of the judgement entry sent via U.S. mail is, under the Convention, the transmittal of a judicial document for service abroad.

The negotiating history of the Convention supports the view that the Convention was not meant to apply "to transmissions abroad that do not culminate in service." See *Volkswagenwerk Aktiengesellschaft v. Schlunk* (1988), 108 S.Ct. 2104, 2109. In appellant's case, the judgment entry transmitted abroad was meant to effectuate service on the appellant. In compliance with Civ.R 58(B) and App.R. 4(A), the judgment entry was filed and mailed to the appellant on June 27, 1996. This judgment entry, mailed to appellant in Switzerland, activated the Hague Treaty in appellant's case.

Although the Hague Treaty applies, the appellant has failed to comply with the requirements of Article 16 of the Treaty and, therefore, is not eligible for relief. Appellant cites to Article 16 for the proposition that this court may accept appellant's Notice of Appeal as timely and, therefore, have jurisdiction to consider the appeal. The relevant section of Article 16 of the Hague Treaty provides, in part, as follows:

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, *and a judgment had been entered against the defendant who has not appeared*, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled.

"(a) The defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, *or knowledge of the judgement in sufficient time to appeal,* and

"(b) The defendant has disclosed a prima facie defense to the aciton on the merits.

"An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment." (Emphasis added.)

The appellant's reliance on the above provision to exempt her from filing a timely Notice of Appeal is without merit. The relevant language of Article 16 provides for a situation where a judgement has been entered against a defendant who has not appeared. This section excludes appellant from the purview of Article 16 since she made an appearance on February 29, 1996, by filing an answer and counterclaim.

The purpose of Article 16 can be construed by reading it in conjunction with Article 15. Article 15 provides theat a judgment may not be entered against a foreign defendant who did not receive timely notice of a lawsuit. See *Volkswagenwerk Aktiengesellschaft* at 2110. Article 16 provides relief to a defendant who did not receive timely notice of the lawsuit and judgment was entered against that defendant.*Id.*

In appellant's case, there was timely notice of the lawsuit, an appearance on appellant's behalf and a judgment on the merits. Therefore, appellant should be denied relief because redress is limited to defendants who have default judgments rendered against them because redress is limited to defendants who have default judgment rendered against them because they did not receive notice of the lawsuit and did not appeal.

In conclusion, the Hague Treaty applies to judicial documents transmitted abroad to effectuate service. The mailing of the judgment entry was meant to effectuate service on appellant. Therefore, the Hague Treaty was triggered and, though applicable to this case, the appellant will not be granted relief since she has failed to meet the test set out under Article 16. Accordingly, since this court lacks jurisdiction pursuant to App.R. 4(A), appellee's motion to dismiss is granted, and appellant's appeal is dismissed.

Appeal dismmissed.

s/ Donald R. Ford
Presiding Judge

CHRISTLEY, J.,
NADER, J.
concur.

**APPENDIX D**

WILLOUGHBY MUNICIPAL COURT
LAKE COUNT, OHIO

„Entered Oct 10 1997"

| | | |
|---|---|---|
| CHRIS URSETTI | ) | CASE NO 96CVG00205 |
| Plaintiff | ) | JUDGE LARRY |
| ALLEN | | |
| vs. | ) | |
| GABRIELLE OMLIN | ) | ORDER |
| Defendant ) | | |

This matter came on for consideration of Defendant's Objections filed September 16, 1997, the response of Plaintiff filed September 26, 1997 and other pleadings, depositions, and trascript of testimony.

Upon review of the above and in conjunction with the pleading heretofore, the Court is of the opion that the decision of the Magistrate is well-founded.

The documents filed by the defendant, an attorney in native Switzerland, do not appear to raise a valid defense to the issues nor to her failure to appear at the hearing(s) in this Court. It does not appear that a counterclaim, apparently emerging out of the same relationship, was dismissed herein with the intent that it be litigated as another case in another court.

The defendant further contends that she is to be treated differently than other litigants because she is a citizen of Switzerland. The Eleventh District Court of Appeals addressed that issue and defendant's request for rconsideration on appeal and in each, the defendant's

requested relief was disallowed. It will be disallowed here as well.

The objections are overruled and the Decision of the Magistrate is adopted. The Motion for Relief from Judgment is overruled.

IT IS SO ORDERED

s/ Larry Allen
Judge

cc: Daniel W. Taylor,
Counsel for Plainiff
David B. Webster
Frank Cumberland,
Counsel for Defendant

**APPENDIX E**

WILLOUGHBY MUNICIPAL COURT
LAKE COUNT, OHIO

„Entered Nov 10 1997"

| | | |
|---|---|---|
| CHRIS URSETTI | ) | CASE NO. 96CVG00205 |
| Plaintiff | ) | JUDGE LARRY ALLEN |
| vs. | ) | |
| GABRIELLE OMLIN | ) | ORDER |
| Defendant | | |

Defendant's Motion for Reconsideration came on before the Court on November 10, 1997. Although Notice of Appeal was filed previously, the Court finds that the matters presented were fully considered previously and said motion is overruled.

IT IS SO ORDERED

s/ Larry Allen
Judge

cc: Daniel W. Taylor,
Counsel for Plainiff
David B. Webster
Frank Cumberland,
Counsel for Defendant

## APPENDIX F

TRANSCRIPT OF TRIAL OF MAY 24, 1996

IN THE STATE OF OHIO, )
) SS: MICHAEL D. MURRAY, MAGISTRATE.
COUNTY OF CUYAHOGA. )

MAGISTRATE MURRAY: For the record, this is Case No. 96 CVG 00205, Christopher Ursetti versus Gabrielle Omlin. We have Mr. Taylor and are you Mr. Ursetti as well?

MR. URSETTI: Yes.

MAGISTRATE MURRAY: And Ms. Omlin is not here. She has contacted the Court. Mr. Taylor, I don't know if you're aware of that?

MR. TAYLOR: No, I'm not.

MAGISTRATE MURRAY: For the record, there is a note in the file, and I'll make this available to you, that on May 6 at approximately 1:10 p.m. Ms. Omlin called from Switzerland and stated that she would be unable to return to the U.S.A. for this particular trial and she left her mailing address and her phone number. And you can look at that document if you so choose.

MR. TAYLOR: No, that's fine.

MAGISTRATE MURRAY: I also have a number of documents in the file that are apparently from Ms. Omlin. About April 1st and May 23rd, and March 13th. There's photos in here as well. I'm not sure what - - if she's expecting this to

be her evidence or what. I don't know if you've seen those or what?

MR. TAYLOR: Oh, no. I may have, I may not have. But I don't need to see them.

MAGISTRATE MURRAY: Now, it's my understanding this is set for a damage and attorney's fee hearing.

MR. TAYLOR: Yes, that's correct. I might add, we were here once before in an effort to make sure that she was notified and I think she had asked the Court to notify her through Bailey Meter.

We're back here again today - - I don't know how extensively you want me to go into this, and it's been a long and winding road, and at one point Ms. Omlin was represented by counsel but is no more.

The long and the short of it is my client, from our vantage point, went through extraordinary measures in order to attempt to gain access and inspect his premises as was his right, from our position, by law and according to the terms of his lease. She refused, categorically, to allow my client to inspect his premises or to have access to his home for the last month of the lease so he could show it to prospective purchasers.

She rented a home from my client, paid rent in advance and then wouldn't let him inspect the premises. Attached to the complaint is a lease with an inspection provision. I attached to the complaint a letter from her refusing to allow him access and I'm also going to, if permitted and proper to the Court, the statute under which we brought this action which allows for attorney's fees. And my client's prepared to testify, these are the attorney's fees that he's incurred by virtue of this action.

The practical matter of this, Your Honor, is that Ms. Omlin has made, from our vantage point, a number of ridiculous accusations, all which were largely unfounded. There's never

been any determination that there was anything wrong with this home. She did damage the property.

MAGISTRATE MURRAY: She withdrew her counterclaim, did you see that?

MR. TAYLOR: Yes, she did. Yes, she did.

And we're asking for, giving her refusal as is evidenced by the letter attached to the complaint and as can be attested to by my client, is that he be compensated for his expenses in getting access to his home which he ultimately procured which she refused and had a right to provide. I don't think there's any question that he had a right to inspect the home.

Ultimately, the referee that was handling this before ordered her to allow my client to inspect the home which he was allowed to do and then through the other counsel, who is no longer here, my client was afforded a limited ability to show his home. Then that counsel was removed or removed himself from the case and that presented additional difficulties.

Now, since Ms. Omlin has vacated, my client has been able to show the home. He sold the home and hopefully he can get on with his life. But there was a period of time there where he couldn't get any access and this was for several months.

So we would ask the Court to consider, and I can present my client to indicate to this Court what actually transpired if you wish, but we would ask that you consider giving us a judgment for the amount of the attorney's fees which we think are allowed by law.

He also incurred damages which were supposed to be faxed to the Court, I don't know if she arrived. As a practical matter, I'm not as concerned with those, there's a $1,000 deposit which my client has retained. My attorney's fees are in excess of that. My client feels, given the circumstance and entitlements, that it would be appropriate to grant him a judgment for that amount.

He would have his remedy by virtue of retaining the security deposit that he has. And Ms. Omlin obviously has left and has no intention of coming back.

And then as it relates to any and all other claims we might have, we're prepared to dismiss those and move on.

MAGISTRATE MURRAY: How are you going to collect any judgment? Is she a resident of Switzerland?

MR. TAYLOR: He has a $1,000 rent deposit of her money. If we get the judgment and she maintains that she has an entitlement to that money back, we can deal with that situation when it presents itself. We don't expect to collect any additional monies.

MAGISTRATE MURRAY: Call your first witness.

MR. TAYLOR: I call Mr. Ursetti.

MAGISTRATE MURRAY: You can sit right there, sir. Do you want to raise your right hand?

Christopher Ursetti, sworn.

MAGISTRATE MURRAY: Have a seat.

Mr. URSETTI: Thank you.

MR. TAYLOR: Mr. Ursetti - - I don't know how extensive you want me to be in this regard. Do you want me to go through all the allegations in the complaint or do you want me to simply ask him what expenses he's got?

MAGISTRATE MURRAY: Well, if we're only here on damages and attorney's fees, is that what I understand?

MR. TAYLOR: that's correct.

MAGISTRATE MURRAY: I thought all the other issues had been resolved.

MR. TAYLOR: Well, yes, they have. Other than the fact that the other referee knew the back drop to this and acknowledged that my client had been denied access in order to

give access, and I don't know that there's ever been a finding of that but that was done.

MAGISTRATE MURRAY: Well, there was and I don't know if you had a chance to review the file, Mr. Taylor, but as of March 19th of '96 there was a judgment entry from Judge Larry Allen that talked about Plaintiff is granted to inspect the premises in question on Monday, March 11th at 9:00 a.m., parties agree that counsel for the Defendant will be present on that day and time with a police officer.

Other parts of it state that counsel for the parties shall be responsible for the arranging of a mutually agreeable time to inspect the premises.

So I understand those issues were an initial problem in the beginning but to me apparently that they had been resolved?

MR. TAYLOR: Correct.

MAGISTRATE MURRAY: Is that right?

MR. TAYLOR: Yes.

MAGISTRATE MURRAY: Now, there was also a claim for some type of damages to the apartment.

Mr. URSETTI: May I excuse myself for one moment?

MAGISTRATE MURRAY: Yes.

Mr. URSETTI: I have to get the faxes that are right here, Your Honor.

MAGISTRATE MURRAY: Yes.

Mr. URSETTI: Thank you.

(Discussion off the record.)

Mr. URSETTI: Your Honor, the bailiff is checking the pages out now and she's going to bring them in.

MAGISTRATE MURRAY: All right. Why don't we proceed?

DIRECT EXAMINATION BY MR. TAYLOR:

Q. Mr. Ursetti, I want to refer you to a document which was attached to our complaint, a Residential Lease, and ask you if you can identify this?

A. yes.

Q. What is that, sir?

A. That's the Lease Agreement between Ms. Omlin and myself.

Q. And does that entail the period from February 1st, '95 to March 31st, '96?

A. yes, it does.

Q. Refer you to Paragraph 14. Can you indicate to the Court what that paragraph in the complaint entails?

A. This is the Right of Inspection Clause in the contract. It states that we have the right to inspect the home once monthly.

Q. Mr. Ursetti, after the lease ensured, did Ms. Omlin move into the premises as scheduled?

A. Yes, she did.

Q. And did she pay her rent?

A. Yes, she did.

Q. Did she allow you to inspect the premises after she moved in?

A. At the time, se didn't really need inspections because she had called for a few things that needed to be done in the house which we agreed upon before she moved in. A stove needed to be fixed and a couple other things. So I had gone there, I checked the house, and I said let's consider this the inspection.

Q. After that, were you permitted to inspect the home when you asked to?

A. No.

Q. And when did she, for the first time, tell you you couldn't inspect the home?

A. It was in the month of September.

Q. Of 1995?

A. '95, yes.

Q. And up until this lawsuit was filed in February, did she, in fact after September, ever allow you to inspect the home?

A. No, she did not.

Q. Did you make efforts in advance to inspect the home? Did you make requests?

A. yes, we did.

Q. I'm going to show you a letter also attached to the complaint dated January 27th directed to your wife signed by Ms. Omlin. Can you identify that letter?

A. yes, I can.

Q. Had you seen that letter when it was issued to your wife?

A. Yes, I have.

Q. Okay. And in that letter, would you please read the - -

A. I'm sorry, one minute please.

Q. All right. Would you read the first paragraph and the portion of the section directed to your wife?

A. The first paragraph it says, The premises at 2870 Cricket Lame in Willoughby Hills is by law in my possession until March 31st, 1996 at 1:30 p.m.

Q. And then the following paragraph.

A. Until that day, you stay out of the premises from the start of the driveway including my mailbox to the end of the backyard and never call or write me again.

Q. This property that was the subject of the lease, was this your property?

A. Yes, it is.

Q. and did you own that property?

A. Yes, I do.

Q. And subsequent to September and after receiving this letter dated January 27th, did you contact my offices?

A. Yes.

Q. And the complaint was filed in February. Up until that point, were you allowed access to the home? Did you continue to request access to the home?

A. Yes.

Q. Were you permitted access to the home?

A. No, we were not.

Q. Mr. Ursetti, I'm going to show you what I'll refer to for identification purposes as Plaintiff's Exhibit No. 1 and ask you whether or not you can identify that bill?

A. Yes.

Q. And is that my bill for legal services rendered to you as a result of having to take this legal action?

A. Yes, it is.

Q. Not including today's services?

A. That's correct.

Q. And if not for the fact that you were denied access, would you have incurred these legal services, from your point of view?

A. Absolutely not.

Q. Mr. Ursetti, did you suffer any damages to your property that were occasioned by Ms. Omlin?

A. Yes, we did.

Q. What damages, if any, did you incur?

A. There is a garage door opener which was in perfect working order when she leased the home, and when the problems arose that we were not able to get into the home, she had the garage door opener changed. And during that period, she had ripped out the wires and whatever she had done and called another company to come in and had it altered to her opener and kept it in her car, so there's no way we could get in the garage.

Q. Does the garage door opener that you had in there work now?

A. No, I had to remove it.

Q. And how much is the garage door opener worth?

A. The fax should be here. It was over $400 was the estimate of the damage.

Q. Any other damage that you incurred?

A. Two toilets were broken, minor parts inside the toilets. No big expenses, but I had to fix them.

Q. Anything else of a major proportion?

A. Other than the septic system which we're not completely sure whether or not she had put something in there to block it and cause it to fail the test for Lake County.

Q. So the primary expense that you've incurred as a result of damage, would have been the garage door opener?

A. Right.

Q. Referring again to the lease, is there a provision dealing with damages to the premises?

A. yes, there is.

Q. Okay. And was she prohibited from damaging your property in the Lease?

A. Oh, yes.

Q. And was this garage door opener yours?

A. Yes.

Q. Did you give her any authority to remove that garage door opener at all or alter it in any way?

A. No. No, I did not.

MR. TAYLOR: That's all we have at this time.

MAGISTRATE MURRAY: How much was the security deposit? Did you present that?

Mr. URSETTI: It was $1,000

MAGISTRATE MURRAY: And that was presented when, when did you receive that?

Mr. URSETTI: We received that and we actually had two leases with her, December - - I'm sorry, it was first leased December of '94. I'm sorry.

MAGISTRATE MURRAY: That was your first lease with her?

Mr. URSETTI: Right

MAGISTRATE MURRAY: That was for what period?

Mr. URSETTI: That was for a six-month period.

MAGISTRATE MURRAY: Right. And you received $1,000 security deposit.

Mr. URSETTI: Right.

MAGISTRATE MURRAY: All right. Now, this lease that we're here on from February 1 of '95 to March '96, that security deposit was held under that lease as well?

Mr. URSETTI: Right. We canceled out the first one and changed it to this lease in February of '95 and extended it.

MAGISTRATE MURRAY: She agreed to that part?

Mr. URSETTI: Yes. She requested it too.

MAGISTRATE MURRAY: What was the monthly rent amount? Did that include the utilities or - -

Mr. URSETTI: No, it did not.

MAGISTRATE MURRAY: And the garage door opener, you said you had replaced the old one?

Mr. URSETTI: We had it removed. We have not replaced it yet. I had an estimate on it and - -

MAGISTRATE MURRAY: What was wrong, she just changed the control on it?

Mr. URSETTI: When I got into the garage, the wires from the original operating button were ripped away. And I don't know what they rigged on there, I have no idea, but the new one would not work. She kept the old transceiver, you know, the old remote and I don't know how or what she did. She didn't leave it there so that we could operate it.

MAGISTRATE MURRAY: Okay. Did you have anyone come out and inspect that?

Mr. URSETTI: Yes. Yes, I did.

MAGISTRATE MURRAY: Who did you have?

Mr. URSETTI: Smooth Door company.

MAGISTRATE MURRAY: And what did they say?

Mr. URSETTI: They said the whole system needed to be replaced since the guy was not sure what the other company had done to it and since there was a different signal on there, he had to remove everything. The estimate should be there, she has them now.

MAGISTRATE MURRAY: Did we ever get those? She came in with some documents. Any of those documents you wish to present or is that it?

MR. TAYLOR: That's all we got.

MAGISTRATE MURRAY: Okay. The Defendant has submitted an affidavit that was filed May 23rd, a copy of which is in the file. And I simply point this out for the record, Mr. Taylor, since she's not here, I don't know

what legal value this has if you want to take a look at it. Of course, she denies any tampering with the garage door opener.

MR. TAYLOR: I haven't seen that, but I received numerous documents from her and I know she denies - - I don't know what to say. All I can tell you is she's one of a kind.

MAGISTRATE MURRAY: Okay. Well, certainly I'll consider all the evidence in this case and consider the appropriate law in determining what the appropriate decision should be and I'll issue a written decision sometime in the next week or two.

MR. TAYLOR: Thank you.

Mr. URSETTI: Thank you, Your Honor.

(Hearing concluded.)

## APPENDIX G

U.S. CONSTITUTION: FOURTEENTH AMENDMENT
Fourteenth Amendment - Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection
Amendment Text | Annotations

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## APPENDIX H

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

December 19, 1966, acceded by the United States on September 8, 1992;
Art. 14

All persons shall be equal before the courts and tribunal. In the determination of any criminal charges against him or of his rights and obligations in a suit at law, shall be entitled to a fair and public hearing by competent, independent and impartial tribunal established by law.

Art. 17

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.

Everyone has the right to the protection of the law against such interference or attacks.

Art. 26

All persons are equal before the law and entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discriminationonany ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*U.S. Reservations, Declarations, And Understandings, International Covenant On Civil And Political Rights, 138 Cong. Rec. S4781-01 (Daily Ed.,April 2, 1992).*

"The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Covenant:

(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination...."

(5) That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to

the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant."

## APPENDIX I

UNIVERSAL DECLARATION OF HUMAN RIGHTS
Resolution 217 (III)A, Document 32, of December 10, 1948;

Art. 7

All are equal before the law and are entitled without any discrimination to equal protection of the law.

Art. 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Art. 10

Everyone is entitled in full quality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him.

Art. 12

No one shall be subjected to arbitrary interference with his privacy, home or correspondence, nor to attacks upon his honor ad reputation. Everyone has the right to the protection of the law against such interference or attacks.

## APPENDIX J

Treaty Of Friendship Between The United States Of America And The Swiss Confederation
of November 25, 1850, set in force on November 8, 1855,

Art. 1

The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon footing of reciprocal equality in the two countries....; they shall have free access to the Tribunals and shall be at liberty to prosecute and defend their rights before courts of Justice, in the same manner as native citizens, either by themselves, or by such advocates, attorneys or other agents as they may think proper to select. No pecuniary or other more burdensome condition shall be imposed upon their residence or establishment, or upon the enjoyment of the above-mentioned right than shall be imposed upon citizens of the country where they reside, nor any condition whatever, to which the latter shall not be subject."

Title 8 - Aliens And NationalityChapter 12 - Immigration And NationalitySubchapter I - General ProvisionsSec. 1101. Definitions

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of aban-

doning and who is visiting the United States temporarily for business or temporarily for pleasure.

*Memorandum of President of the United States, Feb. 7, 1995, 60* Our efforts to combat illegal immigration must not violate the privacy and civil rights of legal immigrants and U.S. citizens. Therefore, I direct the Attorney General, the Secretary of Health and Human Services, the Chair of the Equal Employment Opportunity Commission, and other relevant Administration officials to vigorously protect our citizens and legal immigrants from immigration-related instances of discrimination and harassment. This directive shall be published in the Federal Register. William J. Clinton.

Title 42 - The Public Health And Welfare
Chapter 21 - Civil Rights
Subchapter I - Generally
Sec. 1981. Equal rights under the law

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of

contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

'Amendmend: "Civil Rights Act of 1991'.'

Title 42 - The Public Health And WelfareChapter 21 - Civil Rights

Subchapter I – Generally - Sec. 1985. Conspiracy to interfere with civil rights

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws;